

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

IP-Enabled Services

WC Docket No. 04-36

COMMENTS OF THE MINNESOTA PUBLIC UTILITIES COMMISSION

I. Summary

The Minnesota Public Utilities Commission (MPUC) welcomes this opportunity to submit comments in response to the Federal Communications Commission's (FCC) Notice of Proposed Rulemaking (NPRM). The MPUC's comments about the appropriate framework by which to govern the provision of IP-enabled services, including voice-grade telephone service using internet protocol, are shaped by its recent experience with such services in Minnesota.

Both the FCC and the MPUC uphold the policy objectives contained in the Telecommunications Act of 1996 (Telecom Act or the Act) for any policy relating to telecommunications and IP-enabled services. Specifically, the guiding principles enumerated in the Act are as follows: (1) all customers should have reasonable and affordable access to high-quality voice-grade telephone service; (2) customers who are disabled should have reasonable and affordable access to service that is functionally equivalent to voice-grade telephony service offered to non-disabled customers; (3) customers should have access to emergency services from any provider of voice-grade telephony service which offers its service generally to the public for a fee; (4) customers who purchase voice-grade telephony service from any provider should enjoy basic consumer protections,

including reasonable notice of terms and conditions of service and the safeguard of customer information; and (5) functionally equivalent services should be treated similarly when provided by those similarly situated regardless of the technology deployed or the facilities used, in order to prevent undue discrimination and regulatory arbitrage. *47 U.S.C. § 151, 157*

Similarly, the MPUC pursues the following goals in the execution of its regulatory duties: (1) supporting universal service; (2) maintaining just and reasonable rates; (3) encouraging economically efficient deployment of infrastructure for higher speed telecommunication services and greater capacity for voice, video, and data transmission; (4) encouraging fair and reasonable competition for local exchange telephone service in a competitively neutral regulatory manner; (5) maintaining and improving quality of service; (6) promoting customer choice; (7) ensuring consumer protections are maintained in the transition to a competitive market for local telecommunications service, and (8) encouraging voluntary resolution of issues between and among competing providers and discouraging litigation. *Minn. Stat. §237.011*

The Act clearly envisions a dual regulatory structure, whereby states play a critical role in implementing public policy with respect to telephone services. *47 U.S.C. §253(b) et al.* Moreover, in Minnesota, the Vonage¹ complaint presented facts that, when interpreted under Minnesota law, compelled the MPUC to assert jurisdiction. The Vonage experience provides a unique perspective from which to offer comment on states' authority in the provisioning of IP-enabled services in harmony with the FCC. Telephone services of the type provided by Vonage are telecommunications services governed by the principles of affordability and technological neutrality.

II. The Minnesota Experience Related to VOIP

A. The MPUC Found that Vonage's Services Are Telecommunications Services That Require Compliance With Minnesota Laws

In Vonage, the MPUC found that the Company offers a two-way communication service that is functionally not different from any other telephone service. The MPUC further found that Vonage service intersects with the public switched telephone network (PSTN). The MPUC required Vonage to comply with Minnesota Statutes and Rules, including certification requirements and the provisioning of 911 service.²

¹ In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp. Regarding Lack of Authority to Operate in Minnesota, Docket No. P6214/C-03-108.

² MPUC ORDER FINDING JURISDICTION AND REQUIRING COMPLIANCE, September 11, 2003.

The record evidence in the Vonage case shows services like those offered by Vonage have the characteristics of a telecommunications service. The MPUC evaluated the evidence from the perspective of end users, utilizing the criteria set forth in the FCC's Stevens Report³ as well as Minnesota statutes. The MPUC found that, in the Minnesota case, Vonage (1) holds itself out as providing voice telephony or facsimile transmission service; (2) does not require the customer to use CPE different from that CPE necessary to hold an ordinary touch tone call (or facsimile transmission) over the public switched telephone network; (3) allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and (4) transmits customer information without net change in form or content.

For example, 97 percent of the traffic on Vonage's system touches the PSTN. To be a Vonage customer, a person must have an Internet Service Provider (ISP) and a broadband connection. The Vonage customer uses ordinary CPE and connects it to a phone adaptor, which converts the voice signal from analog to digital "IP" packets and vice versa. Those called by Vonage customers need nothing other than the ordinary CPE and a telephone number assigned in accordance with the North American Numbering Plan (NANP). Similarly, non-Vonage customers call Vonage customers just as they call anyone else, by dialing the NANP-assigned telephone numbers. Again, no special equipment or internet access is required.

From the user's standpoint, there is no change in the form or content of the call and Vonage voice service is no different from voice service offered by traditional telephone companies in terms of simultaneous, two-way communication. The FCC itself recognizes that when protocol conversion is used merely to facilitate the provision of an overall basic service, the protocol conversion is basic service.⁴ All of this is consistent with the important point that the user's perspective must be given great weight in evaluating policy options.

The U.S District Court's decision in Minnesota to classify Vonage's real-time voice service as an information service severely restricts the state's ability to apply critical federal and state policies that are otherwise applicable to carriers offering functionally similar services. Vonage currently avoids paying access charges otherwise assessed on carriers interconnecting with the PSTN, shifting a greater share of the costs of the network to PSTN customers. Vonage will not port numbers in most cases, severely limiting its customers' ability to switch providers. Vonage also avoids contributing to the federal universal service program. The Court's decision exempts Vonage from state requirements for

³ Federal State Joint Board on Universal Service, CC Docket No 96-45, Report to Congress, 1998.

⁴ FCC Memorandum Opinion and Order In re Independent Data Communications Manufacturers Assn, Inc. 10 FCC Rcd 13717, 1995.

making E911 available, raising serious public safety concerns. Under the Court's decision, Vonage would likewise be exempt from having to make its service available to the disabled.

Recognizing that the District Court's conclusion critically undermines the MPUC's obligations to Minnesota telephone users, the MPUC has filed an appeal of the District Court's Order. The case is currently pending before the U.S. Court of Appeals for the Eighth Circuit.

The FCC's ultimate action on the classification of IP-enabled services, including the type that Vonage provides, will have far-ranging impacts on all aspects of state and federal regulation and, ultimately, telephone use. State public safety regulations, state and federal universal service programs, state and federal intercarrier compensation structures, and dispute resolution will all be affected.

B. The MPUC Went Beyond Vonage to Gather Information About VOIP Provisioning in Minnesota

On March 25, 2004, at the invitation of the MPUC, current and prospective VOIP providers addressed the MPUC's quest to understand whether and how the service is planned to be implemented in Minnesota.

The presenters included incumbent and competitive LECs such as Qwest, AT&T, MCI, Onvoy, and cable service providers such as Time Warner and Comcast, as well as public agencies such as the Metropolitan 911 Board and the Minnesota Department of Public Safety. All speakers expressed their belief that IP-enabled services will be the manner by which telecommunications services are expected to grow. The Metropolitan 911 Board and the Minnesota Department of Public Safety indicated that Vonage's proposal to address the 911 requirements in Minnesota is woefully inadequate.

Qwest had been one of the first companies to announce that it is actively marketing voice-grade telephony over IP in direct competition with their own conventional services. Qwest launched its VOIP service in Minnesota in December 2003. AT&T, MCI, and Onvoy indicated that they have either started or is nearing deployment of their VOIP services. Cable companies like Time Warner and Comcast are actively wooing customers to voice and other services using IP technology. Except for the cable providers, all explained that although there may be different ways to provide VOIP, they expect their traffic to intersect the PSTN. The cable providers indicated that they are willing and able to comply with the public safety conditions and similar requirements.

III. Guiding Principles Pertaining to the Treatment of IP-Enabled Services

A. Purpose of the Telecommunications Act

The Act, as amended, defines the principles that should guide the FCC's consideration of how IP-enabled services should be treated. Those principles are: (1) all customers should have reasonable and affordable access to high-quality voice-grade telephone service; (2) customers who are disabled should have reasonable and affordable access to service that is functionally equivalent to voice-grade telephony service offered to non-disabled customers; (3) customers should have access to emergency services from any provider of voice-grade telephony service which offers its service generally to the public for a fee; (4) customers who purchase voice-grade telephony service from any provider should enjoy basic consumer protections, including reasonable notice of terms and conditions of service and the safeguard of customer information; and (5) functionally equivalent services should be treated similarly when provided by those similarly situated regardless of the technology deployed or the facilities used, in order to prevent undue discrimination and regulatory arbitrage.

To achieve the goals of the Act, Congress provided a dual regulatory structure, allowing the FCC and the states to determine the appropriate regulatory framework for telecommunications services nationally and locally, respectively. Congress made clear in §253(b) of the Act that, in removing barriers to entry for interstate or intrastate telecommunications service, "nothing...shall affect" the ability of the state to adopt "requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers," so long as such requirements are competitively neutral and consistent with the Act's universal service provisions. The exigencies of a burgeoning technology notwithstanding, the case has not been made for removing this critical policy standard.

B. The Act is Nondiscriminatory

The Act provides that those who provide telecommunications services must offer those services on reasonable terms and conditions and on a nondiscriminatory basis. *47 U.S.C. §§201, 202*. This requirement is applicable whether the telecommunications service is offered by incumbent LECs, competitive LECs, wireless companies, or cable companies.

The FCC's NPRM reflects this principle, noting that "any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways." *NPRM 61*. The FCC did not exempt AT&T from access charges even though a portion of AT&T's service is transmitted over the internet.⁵ VOIP providers must also satisfy these requirements.

C. The Act is Technologically Neutral

Under the Act, no particular technology is favored or disfavored. The nature of a service depends on whether it meets the definition in the Act, not on the technology or the facilities used to provide the service. Under this principle of technology neutrality, those similarly situated who provide functionally similar services are treated similarly. *U.S.C. § 153(46)*. In the Wireline Broadband Inquiry, the FCC noted that "We believe the statute and our precedent suggest a functional approach, focusing on the nature of the service provided to customers, rather than one that focuses on the technical attributes of the underlying architecture."

Some voice transmissions use a series of interconnected circuit switches, others use a series of interconnected packet switches, and still others use a combination of both, in order to reach a specified destination. The different technologies used, including IP, Time Division Multiplexing (TDM), or analog circuits, may change the manner by which telecommunications is delivered, but it does not change the nature of the service, which is the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received. The nature of telecommunications service does not change because the technological means and physical transport media used to deliver the service have changed.

Under the Act, Congress made no distinctions based on the type of facilities used. The telecommunications network has evolved from circuit-switched voice grade telephony to TDM protocol— and, now, seems to be moving to IP-enabled; but it has not changed the basic nature of the service under the Act.

The Telecommunications Act clearly determined that a telecommunications service is provided "regardless of whether it is using wireline, wireless, cable, satellite, or some other infrastructure" and "regardless of the facilities used." *U.S.C. § 153(46)*. The MPUC urges the FCC to focus on the nature of the service, rather than on the underlying technology used in the provision of service.

⁵ Petition for Declaratory Ruling, FCC 04-97.

D. Telecommunications Services Defined

“Telecommunications services” is defined in the Act to mean “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of facilities used.” *47 U.S.C. § 153(46)*. “Telecommunications,” on the other hand, is defined as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” *47 U.S.C. § 153(43)*. Under *47 U.S.C. § 153(44)*, the term “telecommunications carrier” is defined as “any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.” Thus, to the extent that wireline, wireless and cable providers offer voice service, that service is regulated as a common carrier service.

As the FCC has long recognized, voice grade telephony service is a transmission service where the end user chooses where the call begins and ultimately ends, and where the end user controls the form and content of the message.⁶ In many instances, the end user does not know nor care about the route or technology used to transmit the call. The FCC recently confirmed that AT&T’s service using IP technology is a telecommunications service subject to the requirement governing common carrier service, including the payment of access charges.

To the extent that services using IP technology allow the end user to control the form or content of the transmitted call and to determine its destination, those services would qualify as a telecommunication service if offered to the public for a fee.

⁶ *California v. FCC, In re Amendment of Section 64.702 of the Commission’s Rules and Regulations (Computer Inquiry II)* 77 FCC 2d 384, 420 (1980).

IV. Services of the Type Provided by Vonage are Telecommunications Services

A. The FCC's NPRM Recognizes the Impact of IP-Enabled Services on the Telecommunications Landscape

Internet Protocol is the newest means of providing voice-grade telephone service that is slated to replace earlier generation protocols such as dedicated circuits and digital TDM. With IP-enabled services, real time calls are converted into electronic packets, and then the packetized voice is sent over the public network to its intended destination. Although IP technology has been used for more than a decade by competitive and incumbent LECs to carry traffic over their backbone networks, it has generated more attention lately because its use has been extended to the last mile connection between the carrier and its customers.

In its NPRM, the FCC notes that VOIP providers are “beginning to challenge traditional telecommunications carriers in residential markets – and even today use IP to transport residential interexchange calls, often unbeknownst to end users.”

Indeed, the National Association of Regulatory Utility Commissioners (NARUC) passed a resolution in February 2003 that notes “a significant portion of the nation’s total voice traffic could be transported on IP networks within a few years” and urges the FCC to “confirm its tentative decision that certain phone-to-phone calls over IP networks are telecommunications services.” *NARUC website, 2003 resolutions*. NARUC passed another resolution in November 2003 where it outlined the states’ concerns related to VOIP as follows: (1) uncertainty and reduced capital investment while the scope of the FCC’s authority under Title I is tested in the courts; (2) the loss of consumer protections applicable to telecommunications services under Title II; (3) the disruption of traditional balance between federal and state jurisdictional cost separations and the possibility of unintended consequences and increased uncertainty; (4) the increased risk to public safety; and (5) the potential for a reduced support base for federal and state universal service as well as state and local fees and taxes. *NARUC website, 2003 resolutions*

In addition, numerous companies, including existing providers of traditional voice-grade telephone service, expressly advertise the deployment of IP-enabled services.

Since VOIP is expected to continue its dramatic rate of penetration nationwide, its provision strikes at the heart of voice telecommunications service. The FCC should take into critical consideration the impact of IP-enabled services on the

continued viability and reliability of the telephone system, on the universal service fund, the safety and protection of customers, the enforcement of laws, and the preservation of basic consumer rights.

B. An IP-Enabled Service that Intersects the PSTN is a Telecommunications Service

The Stevens Report noted that even Internet-based calls appeared to “bear the characteristics of ‘telecommunications services, if the following four criteria are met: (1) it holds itself out as providing voice telephony or facsimile transmission service; (2) it does not require the customer to use CPE different from that CPE necessary to hold an ordinary touch tone call (or facsimile transmission) over the public switched telephone network; (3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and (4) it transmits customer information without net change in form or content.”

The fact that a telephone call tracks a portion of its distance over the internet does not exempt it from a telecommunications service classification. The FCC recently classified AT&T’s VOIP offering as a telecommunications service.⁷ Like Vonage’s service, AT&T’s IP offering satisfies the Stevens Report criteria. A difference between Vonage’s and AT&T’s VOIP offerings is that the conversion to digital format takes place within the network with AT&T and on the customer’s side of the network with Vonage.

There may be some IP-enabled services, as the FCC has found in Pulver that should not be regulated, or handled with minimal regulatory oversight. In Pulver, the FCC concluded that since Pulver does not charge for service, under the terms of the Act, their services cannot be classified as telecommunications service.⁸

However, looking beyond the unique characteristics of Pulver, providers offering IP-enabled services that use the PSTN should have similar obligations towards universal service, service quality, consumer protection, and public safety as do their competitors and other users of the PSTN. Congress clearly decided that the type of technology used to transmit voice communications is not relevant in classifying a service as a telecommunications service. *47 U.S.C. §153(46)*. The fact that the internet is used does not make a difference to the proper classification of service.

⁷ Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges, Docket No. WC 02-361.

⁸ Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications nor a Telecommunications Service, Docket No. WC 03-45.

V. Jurisdiction

A. Upholding a Dual Regulatory System

The Act embodies the concept of “cooperative federalism” whereby federal and state agencies are required to harmonize their efforts with one another. While amendments were made to the Act over time to recognize newer developments, Congress has preserved the dual regulatory scheme over telecommunications services.

Federal and state authority over voice-grade telephony service has been a deliberate policy determination on the part of Congress. In the 1996 amendment, Congress expressly preserved the state’s role by enacting the “requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” 47 U.S.C. § 253(b). Although Congress allowed the possibility of preemption, it clarified that the FCC can only do so on a case-specific basis that a particular state regulation has the effect of prohibiting an entity from providing telecommunications service. 47 U.S.C. § 253(d). Congress moreover maintained the primary role of the states in promoting universal service and public safety. 47 U.S.C. §§ 254 and 615. Congress preserved existing state regulations and allowed states to prescribe new regulations. 47 U.S.C. § 261. See also § 252(e)(3) for review of an agreement, and § 153(41) for intrastate operations of carriers. Congress also made clear that promoting advanced services was not the sole responsibility of the FCC, providing in § 706 that “the Commission and each state commission....shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans... .” Congress affirmed in § 601(c) that states can apply laws governing the relationship between a provider of communications, whether interstate or intrastate, and its consumers.

Furthermore, in its Report to Congress, the FCC clarified that forbearance by the FCC precludes a state from applying or enforcing a provision of federal law, but it does not preclude a state from imposing requirements derived from state law.⁹

The FCC and the MPUC are thus compelled to maintain a dual regulatory structure in the pursuit of the shared policy goals embodied in both federal and Minnesota laws.

⁹ Report to Congress, 13 FCC Rcd 11501, para. 48.

B. The MPUC Maintains Authority Over Intrastate Telecommunications Service

Just as there are interstate and intrastate telecommunications services by wireline and wireless carriers, there are interstate and intrastate telecommunications services by IP-enabled service providers. It is reasonable to expect that, with IP-enabled services, determination of the points of origin and destination of the call can become a possibility. Even if the customer is not tied down to any particular geographic location, it may be possible to use proxy methods similar to the ones used for wireless services. The FCC should retain the states' authority over intrastate services.

C. The MPUC and Other States' Roles in Regulation of IP-Enabled Services

The MPUC understands the concerns about regulatory interference in the full growth of evolving technologies and supports a rational system that would not hinder the rapid deployment of IP-enabled services. VOIP should not be subject to any undue economic or rate regulation, but such services should address and satisfy core public interest concerns.

Telecommunications consumers turn first to state commissions for resolutions of their complaints against a provider's provision of service. Thus, state commissions are in the forefront on issues paramount to consumer interests. States have an obligation to look into local service issues. States have a responsibility to protect customers from the adverse impact of exempting VOIP providers from obligations that are called for under state and federal regulations. Those obligations include:

1. Communications Assistance for Law Enforcement Act (CALEA)

IP-enabled service providers should be required to comply with the principles of CALEA.

2. Consumer Protection

Customers should continue to enjoy basic consumer protections governing telecommunications, including reasonable notice of terms and conditions of service, reasonable notice of service termination, preservation of consumer privacy, and truth in billing.

3. Disability Access

VOIP providers should be subjected to the same disability access requirements as all other telecommunications carriers.

4. 911/E911

47 U.S.C. § 615 preserves core state powers to enact safety laws such as 911 requirements. Congress recognized the role of states in public safety matters when it required the FCC to encourage and support efforts by states to deploy comprehensive end-to-end emergency communications infrastructure and programs based on coordinated state plans. Congress could not have intended to exempt IP telephony from 911 laws. The Act and the FCC regulations are replete with provisions clarifying that states and local governments take the lead role in developing, administering and enforcing 911 laws. There simply is no intent to preempt the state's regulation of the provision of 911 service.

The FCC has recently expressed that 911 services remain within the purview of state regulation even in light of VOIP developments. The FCC noted that state action provides greater benefit and concluded that preemption is not presently appropriate.¹⁰

The FCC should prohibit the provisioning of VOIP services without E911 accessibility. Alternatively, the FCC should require E911 compliance within a year. In the meantime, appropriate signage and information about the service's limitations and the manner to access emergency providers should be attached to the CPE.

5. Universal Service

Exempting VOIP providers who use the PSTN from contributing to the universal service fund will erode the support base of the fund and state and local fees and taxes. IP-enabled service providers who use the network should have the same obligations and benefits related to Universal Service as other service providers.

6. Intercarrier Compensation

As a matter of policy, any service provider that makes use of the PSTN should compensate the appropriate carrier for use of the network.

¹⁰ In the Matter of Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems, 18 FCCR 25340, para. 54.

VI. Conclusion

Circumstances have enabled the MPUC to develop a unified perspective on issues related to VOIP. Central to formulation of that perspective has been the guidance of the law and established public policy. The MPUC urges the FCC, likewise, to seek the guidance of the Telecommunications Act of 1996 and previous FCC findings in evaluating the proper regulatory treatment of the rapidly evolving IP-enabled services. These resources clarify terms, delineate jurisdictional balance, safeguard equal treatment among competing providers of telecommunications services and, most importantly, focus on the nature of services, not the nature of delivery mechanisms, in evaluating policy options. The application of the Stevens Report weighs in favor of concluding that services of the type provided by Vonage are telecommunications services. At this point in the evolution of these technologies, it is particularly important that services that use the PSTN be deemed telecommunications services under federal law.

The FCC's fundamental obligations in determining the treatment of IP-enabled services are to:

- Enable the creation and delivery of superior telecommunications services, and
- Safeguard the public interest (i.e., universal service, public safety, basic human rights)

This requires a delicate balancing of interests. Dramatic departures from fundamental policy principles risk an unbalanced outcome.